IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1964.

No. 13

WALKER PROCESS EQUIPMENT, INC.,
*Petitioner,*

*vs.*

FOOD MACHINERY AND CHEMICAL CORPORATION,
*Respondent.*

## REPLY BRIEF OF PETITIONER.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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### CITATIONS.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1964.

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**No. 602.**

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WALKER PROCESS EQUIPMENT, INC.,
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*vs.*

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*Respondent.*

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## REPLY BRIEF OF PETITIONER.

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## ARGUMENT.

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The brief of respondent, FMC, is remarkable in that no where does it mention or discuss, or attempt to defend, the basis upon which the District Court and the Court of Appeals dismissed petitioner's counterclaim. The basis was that any fraud committed by FMC in obtaining its patent was ground for cancellation by the Government, and therefore "fraud on the Patent Office may not be turned to use in an original affirmative action" even by a damaged private litigant. Respondent obviously recognizes that this basis, which it urged and managed to have the courts below adopt, is completely erroneous. While respondent's silence

on this point is interesting, its attempt to base its argument on issues not available to it is untenable.

Respondent now attempts to raise the following points not available to it, namely: that (1) there is no pleading or proof of "relevant market", and (2) even though FMC's motion to dismiss necessarily admits that the patent had been obtained by fraud, FMC really did not mean it.

## RELEVANT MARKET.

With regard to point (1), the question of "relevant market" is obviously one which should not be considered by this court at this time because no lower court found any necessity of pleading the "relevant market" nor ruled on the extent of the pleading if that be required. We may merely point out at this time that if "relevant market" has any bearing, and if specific pleadings are required concerning it, this is a matter of form and not of substance. Paragraph 15 of the second amended counterclaim (R. p. 60) pleads monopolization. So does paragraph 20. Furthermore, it appears from the pleadings in the first amended counterclaim that defendant-petitioner was the only substantial competitor of plaintiff-respondent as to the diffusion assemblies. (R. p. 76.)

While the "relevant market" allegation appears not to have been spelled out in the second counterclaim, its absence was not made the basis of any ruling of the lower courts and could readily have been supplied if the point had been raised.

We may also add that the concept of "relevant market", aside from the lengthy dissertation by FMC, has never been an element of actions based upon illegal monopolization through the use of a patent. While the respondent, FMC, speaks glibly of per se violations of the antitrust laws, and even refers again and again to *White Motor*

*Company* v. *U. S.*, 372 U. S. 253, FMC overlooks the fact that that case itself pointed out at p. 259 that tying sales of the patented article is a per se violation since it is a "bald effort to enlarge the monopoly of the patent beyond its terms." This language does not say that every tying arrangement is a per se violation, but attributes the violation to an attempt to extend the monopoly of a patent beyond its terms. It is the extension of the monopoly which is precisely what FMC attempted to and did do here.

Similarly, in *U. S.* v. *Loew's, Inc.*, 371 U. S. 38 at page 45, the court said "the requisite economic power is presumed when the tying product is patented or copyrighted • • •." Further, the court said at page 46:

> "Since one of the objectives of the patent laws is to reward uniqueness, the principle of these cases was carried over into antitrust law on the theory that *the existence of a valid patent on the tying product*, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anti-competitive consequences."

The present case is not precisely a tying situation. It is, however, precisely the equivalent since FMC used a patent fraudulently obtained by it to obtain sales and to deprive petitioner of sales which petitioner would have secured but for the use of the invalid patent.

**THE ISSUE OF FRAUD IS NOT INVOLVED IN THIS HEARING.**

With regard to point (2), respondent tries to argue whether the evidence adduced proved the fraud or not. That may or may not be an issue when the case goes back but it was not an issue in the Court of Appeals. It is not an issue here except on the matter of attorneys' fees, and then only in connection with the designation of this action as an "exceptional case." FMC does not argue the point in connection with that aspect of the petition.

## CONCLUSION.

Accordingly, the judgment of the Court of Appeals, affirming the judgment dismissing the second amended counterclaim, and the order denying Walker attorney fees, should be reversed.

Respectfully submitted,

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